

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36731

| | | |
|------------------------------|---|---|
| RANDY HOFFER, |) | 2010 Unpublished Opinion No. 395 |
| |) | |
| Plaintiff-Appellant, |) | Filed: March 24, 2010 |
| |) | |
| v. |) | Stephen W. Kenyon, Clerk |
| |) | |
| CITY OF BOISE, |) | THIS IS AN UNPUBLISHED |
| |) | OPINION AND SHALL NOT |
| Defendant-Respondent. |) | BE CITED AS AUTHORITY |
| |) | |

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Order partially granting motion to dismiss, affirmed.

Jacob D. Deaton, Boise, for appellant.

Scott B. Muir of Boise City Attorney's Office, Boise, for respondent.

MELANSON, Judge

Randy Hoffer appeals from the district court's order partially granting the City of Boise's motion to dismiss. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Hoffer owns a trailer park within the City of Boise. A fire in one of the trailers alerted the City to potential electrical hazards throughout the park. An electrical inspector from Boise City's Planning and Development Services Department and representatives from the Boise City Police Department, Fire Department, and Code Enforcement performed a site inspection and found that the trailer park was not in compliance with the National Electrical Code or the Boise Municipal Code. Hoffer was issued two correction notices and a notice of violation. After Hoffer failed on numerous occasions to take corrective action as required by the notice of violation, it was concluded that the electrical wiring, apparatus, and fixtures of the trailer park were an immediate hazard to life and property. Hoffer was given another notice and order to bring his trailer park up to electrical code. Hoffer and his tenants were also given notice that, if

work was not begun within five days, the electrical utility would be terminated in accordance with city code. Hoffer began looking for an electrician to perform the necessary repairs, and the City delayed terminating the electrical utility. Eventually, the deadline arrived and, despite Hoffer's explanations and requests, an Idaho Power representative shut off the electricity to the trailer park.

Hoffer filed suit against the City alleging: (1) tortious interference with his tenant contracts; (2) tortious interference with contracts of potential buyers of the trailer park; (3) negligence; (4) defamation; and (5) intentional infliction of emotional distress. With respect to each of the claims, Hoffer alleged that the City and its agents and employees acted with malice and/or criminal intent. The City filed a motion to dismiss pursuant to I.R.C.P. 12(b)(6) and (c), arguing that a governmental entity has no liability under I.C. § 6-903(a) and (c) where a negligent or wrongful act of an employee was committed with malice and/or criminal intent. The district court granted the City's motion as to counts one, two, five, and part of three, but denied the motion to dismiss the remaining claims. The City subsequently filed a motion for summary judgment as to Hoffer's remaining claims which was granted by the district court.¹ Hoffer appeals, challenging the order dismissing counts one, two, and five of his complaint pursuant to I.C. §§ 6-903(c) and 6-904(3).²

¹ Hoffer does not challenge the order of summary judgment dismissing his remaining claims.

² Idaho Code Section 6-903(c) provides:

The defense of its employee by the governmental entity shall be undertaken whether the claim and civil lawsuit is brought in Idaho district court under Idaho law or is brought in a United States court under federal law. The governmental entity may refuse a defense or disavow and refuse to pay any judgment for its employee if it is determined that the act or omission of the employee was not within the course and scope of his employment or included malice or criminal intent.

Idaho Code Section 6-904 provides, in pertinent part:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

. . . .

II. ANALYSIS

The Idaho Tort Claims Act, specifically I.C. § 6-903, subjects government entities to liability for negligent or wrongful acts committed by the entity or its employees where a private person would also be liable. *Sprague v. City of Burley*, 109 Idaho 656, 669, 710 P.2d 566, 579 (1985); *Limbert v. Twin Falls County*, 131 Idaho 344, 346, 955 P.2d 1123, 1125 (Ct. App. 1998). Idaho Code Section 6-903(c) negates entity liability if the employee acts with malice or criminal intent. *Sprague*, 109 Idaho at 669, 710 P.2d at 579; *Limbert*, 131 Idaho at 346, 955 P.2d at 1125. Liability attaches only to the employee when the act is committed maliciously or with criminal intent. *Limbert*, 131 Idaho at 346, 955 P.2d at 1125.

Hoffer's complaint alleged, as to each of his claims, that the City and its employees acted maliciously and with criminal intent. The Idaho Supreme Court has held that, under such circumstances, the governmental entity cannot be held liable as a matter of law. *Sprague*, 109 Idaho at 669-70, 710 P.2d at 579-80. Hoffer acknowledges that the holding of *Sprague* is directly contrary to the position he advocates, but argues that the holding of *Sprague* is incorrect and should be overruled. However, we must follow the binding precedent from the Idaho Supreme Court and decline to further address Hoffer's arguments that *Sprague* was incorrectly decided. Accordingly, the district court did not err by dismissing Hoffer's claims.

Hoffer argues, alternatively, that I.C. § 6-903(c) permits a governmental entity only to disavow a judgment after it is rendered. Therefore, he alleges that the district court erred by dismissing his claims before a judgment was rendered. As mentioned above, in *Sprague* the Idaho Supreme Court held that, when a complainant alleges malice and/or criminal intent, the governmental entity cannot be held liable as a matter of law. *Sprague*, 109 Idaho at 669, 710 P.2d at 579. Therefore, the district court did not err by dismissing Hoffer's claims.

The City requests reasonable attorney fees on the basis that Hoffer brought and/or pursued this appeal frivolously, unreasonably, without foundation, or in bad faith. Hoffer's

3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

arguments on appeal were clearly contradicted by established precedent. However, Hoffer acknowledged this fact and made a good faith argument for the modification or reversal of existing law. We conclude that this appeal was not brought or pursued frivolously, unreasonably, or without foundation and decline to award the City attorney fees on that basis.

III.

CONCLUSION

The Idaho Supreme Court's decision in *Sprague* holds that a governmental entity cannot be held liable when a complaint alleges malice or criminal intent. Therefore, the district court did not err by dismissing Hoffer's claims alleging malice or criminal intent which were directed only at the City. Accordingly, the district court's order partially granting the City's motion to dismiss is affirmed. Costs, but not attorney fees, are awarded to the City on appeal.

Judge GUTIERREZ, **CONCURS.**

Chief Judge LANSING, **SPECIALLY CONCURRING**

I concur in the foregoing opinion because this Court is bound by the Idaho Supreme Court's decision in *Sprague v. City of Burley*, 109 Idaho 656, 710 P.2d 566 (1985). Nevertheless, I conclude that the appellant has made a meritorious argument that *Sprague* was wrongly decided with respect to the provisions of I.C. § 6-903.

In *Sprague*, the Supreme Court held that section 6-903(c) "specifically exempts governmental entities from liability where the employees act with malice." *Id.* at 669, 710 P.2d at 579. In my view, that interpretation is directly contrary to the plain language of the statute. Subsection (a) of section 6-903 defines when a governmental entity will be subject to liability for tortious acts of its employees. Subsections (b), (c) and (d) define when a governmental entity must provide a defense for an employee and pay any judgment rendered against the employee for the employee's torts committed during the course and scope of employment. Thus, subsection (a) addresses the government's responsibility to third-party plaintiffs, while the next three subsections address the government's rights and responsibilities vis-à-vis the tortfeasor employee. The language on which the *Sprague* decision was based comes from subsection (c) and states, "The government entity may refuse a defense or disavow and refuse to pay any judgment *for its employee* if it is determined that the act or omission of the employee . . . included malice or criminal intent." (Emphasis added.) The plain meaning of that provision is to relieve the government from responsibility to come to the aid of an employee that has been

sued--by providing a defense and paying any judgment rendered against the employee--if the employee's tortious acts included malice or criminal intent. The provision plainly does not relieve the governmental entity of its own respondeat superior liability to the injured plaintiff that may arise under subsection (a).

In addition, the *Sprague* interpretation makes section 6-903(c) incompatible with two other sections of the Idaho Tort Claims Act, sections 6-904A and 6-904B. The latter sections provide that governmental entities will not be liable for certain categories of torts where the act was committed "without malice or criminal intent." They thus contemplate that a governmental entity can be liable for those categories of torts *only* where the act *was* committed with malice or criminal intent (or certain other harmful mental states that are not at issue here). We accordingly have the anomaly that while sections 6-904A and 6-904B allow entity liability only if the specified torts were committed *with* malice or criminal intent, according to *Sprague*, section 6-903(c) allows government liability only if a tort was *without* malice or criminal intent. It is obviously the legislative intent behind sections 6-904A and 6-904B to allow entity liability when the torts were committed with a particularly egregious mental state, including malice or criminal intent.

The *Sprague* Court's misinterpretation of section 6-903(c) defeats the legislative purpose and makes the governmental entity immune from suit whenever a tort was accompanied by malice or criminal intent. I therefore conclude that the *Sprague* decision warrants reexamination by our Supreme Court.